UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALMATIA IMPORT GROUP, INC., Plaintiff, v. FOODMATCH, INC., Defendants.	Case No. 16-CV-0933 **AFFIDAVIT OF MAIA MAGEE**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MAIA MAGEE, declares as follows under penalty of perjury:

1. I am the President and the indirect holder of a fifty percent (50%) interest in Dalmatia Import Group, Inc. ("Dalmatia"), plaintiff in the above-captioned action and, having personal knowledge of the facts set forth below, I make this affidavit in support of Dalmatia's Order to Show Cause, dated February [__], 2016, seeking a temporary restraining order and preliminary injunction enjoining defendant FoodMatch, Inc. ("FoodMatch") from selling its Divina brand fig spread, orange fig spread and sour cherry spread.

I. Dalmatia Builds Its Business And Innovates The Fig Spread Market In The United States

2. Dalmatia is a Florida corporation with its principle place of business at 28 West Flagler Street, Miami, Florida 33130.

3. Dalmatia is a specialty food company that I founded in 1994 with my business partner, Neb Chupin ("Mr. Chupin"). Dalmatia maintains a unique product line inspired by the agriculture and culture of Dalmatia – a district on the Adriatic Coast of Croatia. Our best-selling

products are three varieties of fruit spreads: "Original Fig Spread," "Orange Fig Spread," also known as "Fig Orange Spread," and "Sour Cherry Spread."

4. Dalmatia's origins are in Croatia, where Mr. Chupin grew up and I studied music as a teenager. Mr. Chupin's grandfather dedicated his life to Dalmatian agriculture and was the inspiration behind Dalmatia, which we formed with the intention of supporting local economies, encouraging organic farming, and honoring the Dalmatian way of life. Initially, Dalmatia was dedicated to importing Croatian chocolate, olives, olive tapenades and extra virgin olive oil. We were the first company to export organic products from Croatia to the United States.

5. In early summer 2000, Mr. Chupin and I were traveling in Dalmatia, on the Island of Hvar, with friends when we encountered a jar of fig preserves that reminded Mr. Chupin of his grandfather's fig preserves he enjoyed as a child. We decided that we would refocus our company towards creating our own version of Croatian fig preserves. We came up with the name, "fig spread."

6. We worked with and paid a food technologist to create the perfect recipe and production process for what is now known as Dalmatia "Original Fig Spread." We spent countless hours creating batches of early versions of the Original Fig Spread in small cookers, adjusting and improving flavor nuances and perfecting texture, before settling on Dalmatia's first commercially-released spread.

7. We introduced the Original Fig Spread to the United States in late 2000. At the time, it was the only fig spread on the market, effectively introducing a new product to the United States, inventing a new product name – fig spread – and a new category in cheese departments across the country. It was an instant success.

8. Based on the popularity of the Original Fig Spread, we expanded Dalmatia's line of spreads to include, among others, the Orange Fig Spread and Sour Cherry Spread. Each of these spreads also required many ingredient and process modifications to reach their unique flavor, texture, consistency, and appearance.

9. Dalmatia's spreads have gained widespread acclaim and notoriety with consumers, and have won numerous industry awards. For example, the Original Fig Spread won first place for "Best Salsa, Sauce and Condiment" at the 2006 Americas Food and Beverage Show and Conference, and won the award for "Outstanding Shelf Stable Food Service Product" at the 2010 Fancy Food Show in New York. The Orange Fig Spread won the 2004 NASFT Product Award for "Outstanding Jam, Preserve, Spread or Sweet Topping.

II. Dalmatia's Recipes And Production Processes Are Trade Secrets

10. Dalmatia's spreads have achieved this considerable success by virtue of their unique characteristics, which result through a combination of their recipes and the production processes. The recipes are expressed in percentages of ingredients, while the production processes consist of preparation, mixing, and cooking, and are expressed through flow charts.

11. The Dalmatia Original Fig Spread, Orange Fig Spread and Sour Cherry Spread currently on the market reflect Dalmatia's proprietary recipes and production processes, which we do not, and never have, made public. As explained below, we are diligent in our efforts to maintain the secrecy of our proprietary information. For example, we entered into a non-disclosure agreement with FoodMatch (the "Non-Disclosure Agreement") to protect Dalmatia's proprietary "information, recipes, ingredients, formula, methods, lists, reports or presentations" relating to our products from unauthorized disclosures and always marked any disclosures to FoodMatch as confidential. (Non-Disclosure Agreement at ¶ 1(a)).

III. Dalmatia's Agreements With FoodMatch, In Furtherance Of Building Dalmatia's Brand

12. In or around spring of 2005, we decided to expand Dalmatia's business, but needed help. We approached FoodMatch who, at the time, was a distributor in the olive business and sold a wide array of antipasto items. We believed our Original Fig Spread would be a unique and new complement to FoodMatch's product line, which did not include any sweet items, and felt they could improve our Croatian olive sales as well since they were already involved in the olive market.

13. On December 22, 2006, we entered an agreement with FoodMatch (the "Distribution Agreement"). Pursuant to the Distribution Agreement, FoodMatch obtained the exclusive right to distribute Dalmatia's food products in the United States.

14. As part of the Distribution Agreement, FoodMatch agreed not to sell or promote any competitive products similar to Dalmatia's. (Distribution Agreement at ¶ 1(c), (e)). Additionally, the Distribution Agreement contained an intellectual property clause to protect Dalmatia's trademarks and proprietary recipes and production processes from any improper or unauthorized use by FoodMatch. (Distribution Agreement at ¶ 7(a), (c)).

15. Later, in 2007, FoodMatch sought to have one of its employees tour Dalmatia's United States co-packing facility. Concerned that such a tour would result in the disclosure of Dalmatia's proprietary information, we proposed, and FoodMatch agreed, to enter into the Non-Disclosure Agreement.

16. The Non-Disclosure Agreement provides explicit protections for Dalmatia's proprietary recipes and production processes. (Non-Disclosure Agreement at ¶ 1(a), (b)). Pursuant to the Non-Disclosure Agreement, FoodMatch is prohibited from using any of Dalmatia's proprietary information for any purpose, for the term of the Distribution Agreement

and three years following the termination of any distributor relationship between Dalmatia and FoodMatch. (Non-Disclosure Agreement at ¶¶ 3, 5(a)).

IV. FoodMatch Campaigns For Access To Dalmatia's Proprietary Recipes And Production Processes

17. On numerous occasions after executing the Non-Disclosure Agreement, FoodMatch sought access to Dalmatia's confidential and proprietary information. Such requests were made under the auspices of customer demands. FoodMatch repeatedly told me and others at Dalmatia that if we did not provide detailed proprietary information specifying our recipes and production processes, we would not be able to book new business because such disclosures were the new industry norm.

18. Fearing Dalmatia would lose significant business if we resisted, and believing that Dalmatia's confidential information was protected by its agreements with FoodMatch, Dalmatia provided FoodMatch with the recipes and production processes for Dalmatia's three top-selling products: (1) Original Fig Spread; (2) Orange Fig Spread; and (3) Sour Cherry Spread.

19. Specifically, on or around May 8, 2012, FoodMatch's CEO, Phil Meldrum, told Dalmatia that new FDA and USDA regulations required FoodMatch's retail and foodservice clients to obtain certain information from its food vendors, and that Dalmatia would be required to provide such information or risk losing significant business. In a follow-up e-mail later that day, Meldrum reiterated that providing this information "is the reality of doing business now," and repeated his request for the flow chart detailing the production process for Original Fig Spread in order to consummate a large potential sale.

20. Believing that it was necessary for the business, and that Dalmatia was protected by its Distribution Agreement and Non-Disclosure Agreement with FoodMatch, Dalmatia

provided the information requested, reminding FoodMatch in the cover e-mail that the information "is confidential."

21. Then, on December 5, 2012, FoodMatch requested that Dalmatia provide the country of origin and ingredient composition percentage – *i.e.*, the recipes – for the Original Fig Spread and Orange Fig Spread, along with the flow charts detailing their production processes. Again, believing that Dalmatia would lose business if it failed to provide this information, and assured that Dalmatia's proprietary information was protected by its various agreements with FoodMatch, Dalmatia provided FoodMatch the requested information.

22. Finally, on November 24, 2014, FoodMatch contacted a Dalmatia employee, requesting the recipe and flow chart for the Sour Cherry Spread. In a follow up e-mail on December 1, 2014, FoodMatch stated a "customer is waiting on this document/information."

23. FoodMatch repeated its request for the Sour Cherry Spread recipe and flow chart on December 4, 2014, stating that the request is "for a new customer." FoodMatch continued, "[p]lease know that customers are beginning to require full disclosure of food safety documents and are quick to cut products that cannot meet their expectations – this is becoming the industry norm." Dalmatia provided this information to FoodMatch, again believing Dalmatia's interests were protected.

24. FoodMatch then had all the information necessary to reproduce its own versions of the Original Fig Spread, Orange Fig Spread and Sour Cherry Spread, which FoodMatch, as Dalmatia's distributor, knew to be Dalmatia's three best-selling products.

25. On several occasions, I expressed concern to FoodMatch regarding sharing Dalmatia's confidential and proprietary information. Each time FoodMatch assured me that it

was necessary for Dalmatia's success and that FoodMatch was not trying to create their own competing fruit spreads.

26. On a prior occasion, FoodMatch also sought direct access to our proprietary information through our production facility. In September 2010, FoodMatch informed us that two of its employees were vacationing in Croatia and wished to see Dalmatia's European facility. We agreed to this request and arranged for Dalmatia personnel to greet them. However, the two employees showed up at the facility on a different day, when Dalmatia management was not present. The FoodMatch employees gained unsupervised access to the facility and photographed the plant and manufacturing equipment without permission. Concerned that the photographs contained proprietary information, I immediately requested their return from FoodMatch. FoodMatch demurred, claiming the photographs would only be used for "educational purposes."

V. FoodMatch Produces Competing Products Using Dalmatia's Proprietary Recipes And Production Processes

27. Pursuant to the terms of the Distribution Agreement, Dalmatia provided notice in early October 2015 that we would be terminating the Distribution Agreement as of December 31, 2015. After closing out the year with FoodMatch, Dalmatia switched to a new distributor in January 2016.

28. From January 17th to 19th, 2016, I attended the annual Fancy Food Show in San Francisco, California. The Fancy Food Show is the largest specialty food trade event on the West Coast and is one of the few occasions Dalmatia has to interact directly with our customers, as opposed to through a distributor.

29. While at the Fancy Food Show, I discovered that FoodMatch was marketing its own fruit spreads under the trade name "Divina." FoodMatch's Divina fruit spreads are

available in three varieties – fig, orange fig and sour cherry – the same varieties for which FoodMatch obtained Dalmatia's recipes and production processes. The Divina products are also available in the same packaging options offered by Dalmatia – retail and bulk.

30. I further learned at the Fancy Food Show that FoodMatch was aggressively, and misleadingly marketing its Divina spreads to Dalmatia's customers, in many instances, prior to the December 31, 2015 termination of the Distribution Agreement. For example, several of our largest customers reported that FoodMatch misrepresented to them that Dalmatia's spreads were discontinued, and offered them Divina spreads as replacements.

31. Other Dalmatia customers informed me that FoodMatch provided them with, and encouraged them to engage in, side-by-side taste test comparisons of Dalmatia and Divina samples and, after establishing they were comparable products, offered the Divina spreads at a significant discount to Dalmatia's price points.

32. In fact, I learned that one of our significant customers is now carrying FoodMatch's Divina spreads after witnessing its display of Divina spreads at their booth at the Fancy Food Show.

33. Yet another customer informed me that it decided to test a new brand of fig spread (FoodMatch's) "several months ago," and, going forward, would only be carrying the new spread, which was offered at a significant discount to the prices offered by Dalmatia. Thus, it is my belief that FoodMatch was developing the Divina spreads while still acting as Dalmatia's distributor, notwithstanding the clear prohibition of such conduct in the Distribution Agreement.

34. Upon conducting a taste test, I discovered that the Divina spreads share identical flavor profiles and consistencies with their Dalmatia counterparts. Based on my expertise and years of experience developing and working with Dalmatia's Original Fig Spread, Orange Fig

Spread and Sour Cherry Spread, it is my determination that FoodMatch's Divina spreads are utilizing Dalmatia's recipes and production processes. Mr. Chupin – who acts as Dalmatia's head of production – reached the same conclusion.

35. In over fifteen years of production, no other company had been able to duplicate Dalmatia's fig spread recipes and capture the taste, texture, consistency and appeal of Dalmatia's spreads. Yet, FoodMatch was able to do so within weeks of the termination of the Distribution Agreement. I can only conclude that the sole reason FoodMatch was able to launch its Divina spreads within two weeks of the termination of the Distribution Agreement is because it had access to and misappropriated Dalmatia's proprietary recipes and production processes.

VI. FoodMatch's Misappropriation And Representations To The Marketplace Are Causing Irreparable Harm To Dalmatia's Business

36. With each day that passes, FoodMatch's theft of Dalmatia's proprietary recipes and production processes is causing Dalmatia further irreparable harm.

37. Since the Original Fig Spread's introduction, several other fig spreads have been brought to the market by other companies, but they have not been able to compete for Dalmatia's market share. As of December 2015, Dalmatia remained the dominant fig spread on the market.

38. Yet FoodMatch's aggressive marketing of its offending products, targeting long-term Dalmatia customers has already left an indelible mark on Dalmatia's business. Dalmatia projected selling over 11,000 cases, collectively, of Original Fig Spread, Orange Fig Spread and Sour Cherry Spread in January 2016, based on similar sales for the month the past two years. However, as a direct result of FoodMatch's tactics, requiring Dalmatia to compete against its own proprietary recipes and processes, offered at lower prices, Dalmatia sold only 3,566 cases this January, representing a decline in sales of approximately 68%.

39. The harm does not end there. Dalmatia prides itself on its reputation, built over the past sixteen years of business, for providing unique, high-quality fruit spreads to consumers. We have invested a tremendous amount of time and money developing our brand and product line and have worked tirelessly to gain the recognition we deserve as a premium supplier of fruit spreads. FoodMatch is causing irreparable harm to Dalmatia's business reputation by misleading customers into believing that our products are not unique and, worse, have been discontinued.

40. FoodMatch's actions have already resulted in real and tangible harm to our brand and goodwill with long-time customers, who are replacing our products with Divina spreads, which are the same products, but at lower price points. By offering its offending products at a substantial discount, FoodMatch has captured shelf-space with our customers, effectively pushing Dalmatia spreads off the shelves of retailers around the country. Indeed, customers have told me that FoodMatch has made it known that this is their goal.

41. If FoodMatch is not enjoined from selling its competing Divina fig, orange fig and sour cherry spreads, Dalmatia's future is in immediate jeopardy. In my estimation, Dalmatia is only a few months away from going out of business without the Court's intervention.

Maia Magee

Maia Magee

Sworn to before me this 5
day of February, 2016

Megan R. Parker
Notary Public

MEGAN R. PARKER
STATE OF
MY
COMMISSION
EXPIRES
SEPT. 18, 2018
NOTARY PUBLIC
NEW HAMPSHIRE